

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
March 5, 2008 Session

**PHYLLIS A. RICE v. AMIT S. PATEL ET AL.**

**Appeal from the Circuit Court for Davidson County  
No. 05C-2454     Hamilton V. Gayden, Judge**

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**No. M2007-02388-COA-R3-CV - Filed June 30, 2008**

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Plaintiff appeals from an adverse judgment rendered in a negligence case in which the trial court recalled the jury to the courtroom to give a supplemental instruction on comparative fault it had erroneously omitted. In her complaint, the plaintiff alleged the defendants negligently operated a vehicle causing her injuries. The defendants answered the complaint denying any wrongdoing and pleading the affirmative defense of comparative fault. The matter went to a jury trial, and the court instructed the jury on the issue of negligence but failed to instruct the jury on the issue of comparative fault. Immediately after the jury retired for deliberations, the defense counsel requested that the trial court call the jury back to the courtroom and give the omitted instruction. Plaintiff's counsel agreed to recall the jury on the condition the trial court also give a curative instruction. Three minutes after the jury originally left the courtroom, the trial court recalled the jury to the courtroom and gave the requested instructions, following which the jury returned to deliberate. Three hours later, the jury returned a verdict for the defendants. Plaintiff appeals, contending the omission of the instruction of comparative fault and subsequently giving the omitted instruction after the jury had been excused to deliberate, constitutes reversible error. We agree it was error but Plaintiff has failed to establish that the error more probably than not affected the judgment or resulted in prejudice to the judicial process. Therefore, the error does not constitute reversible error. Accordingly, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY BENNETT, J., joined.

Henry S. Queener, Nashville, Tennessee, for the appellant, Phyllis A. Rice.

Melissa B. Muller, Nashville, Tennessee, for the appellees, Amit S. Patel and Sharad M. Patel.

## OPINION

This case arises out of an August 2004 automobile accident on Hillsboro Road in Davidson County. During the accident, the vehicle driven by Defendant Sharad Patel collided with the vehicle driven by Plaintiff Phyllis Rice, causing injury to the plaintiff.

Subsequently, Plaintiff filed this negligence action against the driver, Sharad Patel, and the registered owner of the vehicle, Amit Patel. Defendants filed an answer denying liability and asserting the affirmative defense of comparative fault.

The matter was tried before a jury in August of 2007. After a one and one-half day trial, the jury was charged; however, the instruction on the issue of comparative fault was inadvertently omitted from the instructions given to the jury. The jury was excused to the jury room for deliberation at 11:16 a.m. Immediately after the jury left the courtroom, Defendants objected to the jury instruction based on the omission of the comparative fault instruction and requested that the jury be brought back in and given the proper instruction. Seeking the opinion of Plaintiff's counsel, the trial court inquired as to whether he had any objection. Plaintiff's counsel stated that he had no objection as long as the proper curative jury instruction was also given.

With the approval of the parties, the trial court immediately called the jury back into the courtroom at 11:19 a.m., a mere three minutes after they had been excused to begin deliberations, at which time the trial court gave the two requested instructions, the curative instruction and the instruction on comparative fault. Six minutes later, at 11:25 a.m., the jury was again excused to deliberate. Three hours later, the jury returned to the courtroom and announced their verdict in favor of Defendants. This appeal followed.

## ANALYSIS

The plaintiff contends the omission of the instruction of comparative fault and subsequently giving the omitted instruction after the jury had been excused to deliberate, constitutes reversible error.

It is well settled that the "trial court's instructions should be complete and accurate and should fairly reflect the parties' theories of the case." *Ladd by Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83, 102 (Tenn. Ct. App. 1996). Accordingly, the trial court has the duty to "instruct on every issue of fact or theory of the case raised by the pleadings and supported by the proof." *Cole v. Woods*, 548 S.W.2d 640, 642 (Tenn. 1977) (citations omitted). Nevertheless, we do not measure a trial court's jury instruction against the standard of perfection. *Grissom v. Metro. Gov't of Nashville*, 817 S.W.2d 679, 685 (Tenn. Ct. App. 1991) (citing *Davis v. Wilson*, 522 S.W.2d 872, 884 (Tenn. Ct. App. 1974)). "Instead, we review the entire charge just as the jury would, *Memphis St. Ry. v. Wilson*, 69 S.W. 265, 265 (Tenn. 1901); *Abbott v. American Honda Motor Co.*, 682 S.W.2d 206, 209 (Tenn. Ct. App. 1984), and we will not invalidate it as long as it fairly defines the legal issues involved in the case and does not mislead the jury." *Grissom*, 817 S.W.2d at 685 (citing *Smith v. Parker*, 373 S.W.2d 205, 209 (Tenn. 1963); *Illinois Cent. R. Co. v. Spence*, 23 S.W. 211, 215 (Tenn.

1893)). In Tennessee, the jury charge will be “viewed in its entirety and considered as a whole in order to determine whether the trial judge committed prejudicial error.” *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn. 1992) (citing *Abbott*, 682 S.W.2d at 206).

Defendants properly pled the affirmative defense of comparative fault in their Answer to the Complaint. The defense was put at issue during the trial of the case, and therefore, Defendants had the right to have the jury instructed on comparative fault. The trial court admittedly failed to instruct the jury on the issue of comparative fault. Immediately after the jury was charged and excused, Plaintiff’s counsel properly and timely objected to the incomplete jury instruction. *See* Rule 51.02 of the Tennessee Rules of Civil Procedure (“After the judge has instructed the jury, the parties shall be given opportunity to object, out of hearing of the jury, to the content of an instruction given or to failure to give a requested instruction . . .”). Upon hearing defense counsel’s objection and request that the court provide a supplemental instruction on comparative fault, the trial court turned to Plaintiff’s counsel, and the following exchanged occurred:

*Trial Court:* Do you have any objection to the comparative negligence being charged?

*Plaintiff’s Counsel:* I do not as long as there is some sort of curative instruction read before that saying it isn’t more important than any of the others. It doesn’t reflect any decision made on your part. You’re just doing it because it was not read.

With the approval of the parties, the court immediately – within three minutes of excusing them – called the jury back into the courtroom and gave both the requested curative instruction and the pattern instruction on comparative fault. After the trial court gave the foregoing instructions the jury was again excused to deliberate and neither party expressed any objection to the second set of instructions. Three hours later, the jury announced its verdict.

By failing to object to the second instruction given to the jury, Plaintiff has waived any challenge she may have concerning the propriety of the second instruction. *See* Tenn. R. App. P. 36(a); *see also State v. McPherson*, 882 S.W.2d 365, 375 (Tenn. Crim. App. 1994). Moreover, since she requested the second instruction and the court gave the instruction she requested, Plaintiff has no basis upon which to complain about the content of the second instruction.

Plaintiff is correct in stating that the trial court erred by failing to give the instruction of comparative fault along with the entire instruction to the jury before excusing the jury to begin deliberations. A trial court should instruct the jury on every issue of fact and theory of the case that is raised by the pleadings and is supported by the proof. *Spellmeyer v. Tenn. Farmers Mut. Ins. Co.*, 879 S.W.2d 843, 846 (Tenn. Ct. App. 1993). Trial courts should also give requested jury instructions if the instructions are supported by the evidence and correctly state the party’s theory and the applicable law. *Otis*, 850 S.W.2d at 445. When a trial court fails to instruct the jury on every issue of fact and theory of the case that is raised and supported by the proof, it has erred; however, a jury verdict will not be reversed unless it is shown that the failure to give the instruction or the manner in which the instruction was given more likely than not affected the verdict. *Bara v. Clarksville Mem’l Health Sys., Inc.*, 104 S.W.3d 1, 3 (Tenn. Ct. App. 2002); *see also Richardson*

*v. Miller*, 44 S.W.3d 1, 26 (Tenn. Ct. App. 2000); *Helms v. Weaver*, 770 S.W.2d 552, 553 (Tenn. Ct. App. 1989).

We acknowledge that the trial court erred by omitting the instruction on comparative fault; however, we find no basis upon which to conclude that the error, which was corrected, constituted reversible error. To constitute reversible error, it must appear that the error “more probably than not affected the judgment or would result in prejudice to the judicial process.” *See* Tenn. R. App. P. 36(b). The error, omitting the instruction on comparative fault when the court initially instructed the jury, was subsequently and promptly corrected by the trial court recalling the jury and giving the requested and proper instruction on the issue of comparative fault. Finding no reversible error, we affirm the trial court.

#### **IN CONCLUSION**

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the appellant, Phyllis Rice.

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FRANK G. CLEMENT, JR., JUDGE